No. 86-1311

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

A. L. LABORATORIES, INC. and A/S APOTHEKERNES LABORATORIUM FOR SPECIALPRAEPARATER,
Petitioners,
v.
NORTH AMERICAN PHILIPS CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR THE PETITIONERS

Of Counsel:
GLEN E. HESS
KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2000

JAMES H. WALLACE, JR.*
JAMES M. JOHNSTONE
RICHARD L. MCCONNELL
FRANK WINSTON, JR.
of
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

GENE E. VOIGTS
JOHN S. JOHNSTON
of
SHOOK, HARDY & BACON
Mercantile Bank Building
1101 Walnut Street
Twentieth Floor
Kansas City, Missouri 64106
(816) 474-6550
Counsel for Petitioners

* Counsel of Record

March 20, 1987

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1311

A. L. LABORATORIES, INC. and A/S APOTHEKERNES LABORATORIUM FOR SPECIALPRAEPARATER,

Petitioners,

v.

NORTH AMERICAN PHILIPS CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

REPLY BRIEF FOR THE PETITIONERS

Petitioners A.L. Laboratories, Inc. and A/S Apothekernes Laboratorium for Specialpraeparater ("AL Labs") respectfully submit this Brief in reply to Respondent's Brief in Opposition to the Petition for a Writ of Certiorari.

ARGUMENT

I. Respondent's Statement of the Case Is Contrary to the Facts of Record.

Respondent's Brief in Opposition ("Brief") simply cannot be relied on by the Court in deciding whether to grant certiorari in this case. Starting with a highly inaccurate (and in some cases outright false) "Statement

of the Case," the Brief makes several arguments which are simply contrary to the record. Stripped of its misrepresentations, Respondent's Brief merely confirms, as Petitioners have consistently asserted, that there was a factual dispute concerning Respondent's direct participation in the misappropriation of Petitioners' trade secrets, which was improperly withheld from the jury. Particularly in light of the current controversy over summary judgment/directed verdict standards discussed in the Petition (pp. 8-11), this improper deprivation of Petitioners' right to jury trial raises issues going beyond the particular dispute between the parties which warrant certiorari.

Respondent's factual inaccuracies begin with the false assertion that "North American was not involved in the negotiation, drafting, or approval of the terms of the [November, 1973 marketing] agreement" between Thompson-Hayward and AL Labs. Brief, p. 2. In fact, Respondent's executive Robert Callahan *admitted* that he "negotiated" the deal and then "utilized" Respondent's other subsidiary, Philips-Roxane, to implement it. J.A. 298-305.

It is also simply untrue that there is "no evidence that any North American personnel attended any meetings in 1979 where the ownership of the data was discussed," and untrue that "there was no evidence that North American's involvement related in any way to the AHI data aspect of the application." Brief, p. 4. Both the Court of Appeals and the District Court recognized that a Philips-Roxane memorandum (PX 71) showed NAP's Callahan in attendance at "at least one of an apparent series of" 1979 meetings at which the "questionable morality and legality" of using Petitioners' data was raised. Appendix A at 15a; Appendix B at 27a. Also, NAP's LeFever was directly consulted by Philips-Roxane concerning use of Petitioners' data, and he admitted looking into the matter and learning that "*A.L. had paid for the study*," and had made additional payments under the

agreement terminating the Marketing Agreement. Petition, pp. 5-6, *citing* J.A. 278-281, 519-20, 528-30 (emphasis supplied).[1]

II. Contrary to Respondent's Assertion, Petitioners Raised the Direct Liability Theory at Every Step of This Proceeding.

Equally false is Respondent's argument that Petitioners failed to raise and preserve the direct liability issue. Brief, pp. 5-6. Petitioners presented evidence at trial of NAP's direct involvement in the trade secret theft. *See* Petition, pp. 3-6. Petitioners requested an instruction on direct liability (Appendix H at 43a), which was denied. Appendix I at 45a. The District Court recognized petitioners' joint tortfeasor direct liability contention in granting judgment n.o.v. (Appendix B at 26a), and engaged in a tortured analysis of conflicting evidence to deal with it. *Id.* at 26a-28a. The Court of Appeals recognized (although it did not expressly rule on) Petitioners' alternative contention that Respondent "should share in the direct liability for the misappropriation" (Appendix A at 13a), which was raised in Petitioners' opening and reply briefs in the Court of Appeals, as well as in the subsequent Petition for Rehearing.[2] Respondent's conten-

---

[1] Contrary to Respondent's Brief, p. 3, the termination agreement, which required the transfer or assignment to AL of "any other FDA submissions made by or on behalf of TH relating to AL's Zinc Bacitracin," covered the AHI data. Indeed, the jury found that "at some time prior to 1979 A.L. Labs became entitled to ownership and possession of the AHI test data in Master File 3578." Appendix F at 38a. Respondent neglects to tell the Court that NAP's LeFever actively participated in negotiating and drafting the termination agreement (J.A. 419, 514, 516) and that the Court of Appeals "summarily rejected" the argument reasserted in Respondent's Brief, pp. 3-4, that Philips-Roxane had an "ownership interest" in the data. Appendix A at 6a.

[2] *See* Brief of Petitioners-Appellants, pp. 23-28 (Oct. 30, 1985), Reply Brief of Petitioners-Appellants, pp. 18-22 (Jan. 24, 1986), and Petition for Rehearing, p. 1 (Oct. 22, 1986). Indeed, in their opening brief, Petitioners expressly called the Court of Appeals'

tion that the direct liability issue, with its Seventh Amendment implications arising from the trial court's improper directed verdict, was not timely raised below is clearly contrary to the record.[3]

III. This Case Concerns the Proper Role of Court and Jury in Cases Involving Disputed Facts, Not Questions of State Law or Review of Evidence.

Asserting that "the decisions below were correct in light of the evidence and applicable law" (Brief, pp. 9-12), Respondent claims that Petitioners' proof failed to meet a "clear and convincing evidence" standard derived from Missouri civil conspiracy law. Brief, p. 11. But this new theory played no part in either the Court of Appeals' or District Court's ruling and has never before been raised by Respondent. Indeed, the District Court said nothing about state law or burden of proof in denying petitioners' requested joint tortfeasor instruction or in its j.n.o.v. ruling on direct liability. Appendix I at

---

attention to their objection to "the trial court's failure to give a separate instruction on the direct liability theory." Brief of Peitioners-Appellants, p. 27 n.20 (Oct. 30, 1985).

[3] *See Universities Research Ass'n Inc. v. Coutu*, 450 U.S. 754, 768 n.17 (1981) (disputed issue was properly before Court where Court, after review of the pleadings, argument of summary judgment motion and District Court's characterization of the issue in its summary judgment ruling, determined that the issue had been raised and passed upon by the District Court and Court of Appeals). The case at issue thus differs substantially from *Hoover v. Ronwin*, 466 U.S. 588 (1984), *Cort v. Ash*, 422 U.S. 66 (1975) and *Neeley v. Martin K. Eby Construction Co.*, 386 U.S. 317 (1967), cited by Respondent. In *Hoover*, this Court refused to address an argument made for the first time in response to a motion for rehearing in the Court of Appeals. 466 U.S. at 577 n.25. In *Cort*, this Court refused to address an issue respondent had deliberately dropped from his amended complaint in the District Court. 422 U.S. at 72-73 n.6. In *Neeley*, this Court refused to address a new issue which petitioner first raised "[i]n a short passage at the end of her brief" in this Court. 386 U.S. at 330.

45a; Appendix B at 26a-28a. Instead, the District Court improperly drew inferences and made findings and conclusions from disputed evidence as if the jury did not even exist. *See* Petition, p. 10.

Contrary to Respondent's assertion (Brief pp. 6-8), Petitioners are not seeking "a review of evidence and specific facts" or raising questions of state law. Rather Petitioners contend that the District Court acted improperly on a matter of federal procedure and constitutional law when it took from the jury a factual issue which was, and remains to this day, sharply disputed. It is this federal constitutional question which requires the use of this Court's supervisory power.

Nor can there be any doubt as to the importance of the issue. As the Petition demonstrated (pp. 10-11), during 1986 this Court issued three sharply divided opinions on summary judgment/directed verdict standards which created substantial fears that "the constitutionally enshrined role of the jury would be eroded." *Anderson v. Liberty Lobby, Inc.*, —— U.S. ——, 106 S. Ct. 2505, 2520 (1986) (Brennan, J., dissenting). *See Celotex Corp. v. Catrett*, —— U.S. ——, 106 S. Ct. 2548 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, —— U.S. ——, 106 S. Ct. 1348 (1986). By granting certiorari in this case the Court can make clear to the federal court system that the jury is and must remain the ultimate trier of disputed facts.

CONCLUSION

Respondent's inaccurate and misleading Brief in Opposition is entitled to no credence by this Court. The District Court's refusal to let the jury decide the direct liability issue, coupled with its setting aside of the jury's punitive damage verdict based on vicarious liability, improperly deprived Petitioners of their jury trial right. Justice has been denied since Respondent has thus far

been allowed to escape responsibility for misdeeds the jury considered deserving of punishment. For the reasons stated herein and in the Petition, Petitioners respectfully request that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

Of Counsel:

GLEN E. HESS
KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2000

JAMES H. WALLACE, JR.*
JAMES M. JOHNSTONE
RICHARD L. MCCONNELL
FRANK WINSTON, JR.
of
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

GENE E. VOIGTS
JOHN S. JOHNSTON
of
SHOOK, HARDY & BACON
Mercantile Bank Building
1101 Walnut Street
Twentieth Floor
Kansas City, Missouri 64106
(816) 474-6550
Counsel for Petitioners

* Counsel of Record

March 20, 1987